Supreme Court, U.S.
FILED

(1)

CASE NUMBER: 95-327 JUL 11 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

**SILVER ROSE ENTERTAINMENT, INC.**, A FLORIDA CORPORATION; **SUNSHINE FOOD MART**, A FLORIDA PROPRIETORSHIP; **DALE'S PACKAGE STORE AND LOUNGE INC.**, A FLORIDA CORPORATION; **KELLY NAIL, INC.**, A FLORIDA CORPORATION; **WARD CASTENADA, INC.**, A FLORIDA CORPORATION; **HARRY'S OF ORANGE PARK, INC.**, A FLORIDA CORPORATION; **VARSITY CLUB, INC.**, A FLORIDA CORPORATION; **FLYNN RESTAURANTS, LTD.**, AN IOWA CORPORATION, **57 HEAVEN**, A CORPORATION; AND **PRINTER ENTERPRISES, INC.**, A FLORIDA CORPORATION,

PETITIONERS,

V.

**CLAY COUNTY**, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND **SCOTT LANCASTER**, AS SHERIFF OF CLAY COUNTY,

RESPONDENTS.

---

PETITION FOR WRIT OF CERTIORARI FROM
THE FLORIDA FIRST DISTRICT COURT OF APPEAL

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, FAILS THE LEMON TEST, THEREBY VIOLATING THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, VIOLATES THE EQUAL PROTECTION CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

## LISTING OF PARTIES

**Petitioners:**

(1) SILVER ROSE ENTERTAINMENT, INC.
(2) SUNSHINE FOOD MART
(3) DALE'S PACKAGE STORE AND LOUNGE INC.
(4) KELLY NAIL, INC.
(5) WARD CASTENADA, INC.
(6) HARRY'S OF ORANGE PARK, INC.
(7) VARSITY CLUB, INC.
(8) FLYNN RESTAURANTS, LTD.
(9) 57 HEAVEN
(10) PRINTER ENTERPRISES, INC.

**Respondents:**

(1) CLAY COUNTY, FLORIDA

(2) SCOTT LANCASTER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation, Petitioners

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County, Respondents

PETITION FOR WRIT OF CERTIORARI
to the Florida First District
Court of Appeal

The petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Florida First District Court of Appeal entered on November 22, 1994, which upheld the judgment granted in favor of the Respondents on December 22,

1993.

## OPINIONS BELOW

The Order of the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida, denying Petitioners' Motion for Temporary Injunction entered on December 22, 1993 is located on page 1 of the appendix. The Opinion of the Florida First District Court of Appeal entered November 22, 1994 affirming the circuit court's ruling is located on page 12 of the appendix. The Denial of the Petition for Review entered by the Florida Supreme Court dated April 12,. 1995, is located on page 38 of the appendix.

## JURISDICTION

The opinion of the Florida First District Court of Appeal was entered November 22, 1994. Petitioners'' Petition for Review, which was timely filed with the Florida Supreme Court, was denied on April 12, 1995. The Court has jurisdiction over this case

pursuant to Title 28 § 1257 of the United States Code which provides, in part, that the Supreme Court of the United States may review final judgments or decrees rendered by the highest court of a State in which a decision could be had, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C.A. § 1257. Also, this Court may invoke jurisdiction as provided by Rule 10(.1)(b) of the Rules of the Supreme Court of the United States. The Rule provides that inconsistent rulings concerning a federal question between two state courts of last resort is a reason that will be considered in deciding on a petition for writ of certiorari review. Sup. Ct. R. 10.

The judgment sought to be reviewed was entered by the Circuit Court of the Fourth Judicial Circuit, in and for Clay County, Florida, and affirmed by the First District

Court of Appeal of the State of Florida on November 22, 1994. The Supreme Court of Florida declined to accept jurisdiction and denied the Petition for Review on April 12, 1995. The Florida First District Court of Appeal (i.e. the highest appellate court in Florida that rendered a written opinion) held that a Clay County, Florida ordinance prohibiting the sale of alcoholic beverages on Christmas Day passed the Lemon test and, therefore, was not in violation of the Establishment Clause contained in the First Amendment to the United States Constitution. In a conflicting opinion, the Supreme Court of Connecticut, in Griswold v. State, held that a similar statute prohibiting the sale of alcohol on Good Friday violated the three prong Lemon test and was, therefore, unconstitutional because it violated the Establishment Clause of the Constitution. Griswold v. State, 183 Conn. 552, 441 A.2d 16 (1981).

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

United States Constitution, Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CLAY COUNTY, FLORIDA, CODE § 3-2(c)

An exception to the above stated hours of sale shall be that no alcoholic beverages shall be sold on Christmas Day until the regular authorized opening sale time on December twenty-sixth. The intention of this subsection is that no alcoholic beverages be sold during Christmas Day and Christmas night of each year. Clay County, Fla., Code § 3-2(c).

TITLE 28 § 1257 UNITED STATES CODE

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any

title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 28 U.S.C.A. § 1257.

RULES OF THE SUPREME COURT, RULE 10

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10.

## STATEMENT OF THE CASE

This case involves the issue of whether a county's power to regulate is so broad that it can enact ordinances that prohibit a single business class from selling its products on Christmas Day without the ordinance being subjected to meaningful court scrutiny.

In the State trial court, Petitioners challenged the constitutional validity of an ordinance enacted by Clay County, Florida, which provides:

> (c) An exception to the above stated hours of sale shall be that no alcoholic beverages shall be sold on Christmas Day until the regular authorized opening sale time on December twenty-sixth. The intention of this subsection is that no alcoholic beverages be sold during Christmas Day and Christmas night of each year.

Clay County, Fla., Code Section 3-2(c). Petitioners' suit asserted that counties only have the power to regulate, not prohibit, the sale of alcohol. Further, even if counties possess the power to prohibit the sale of

alcohol, the ordinance at issue violated constitutional principles by singling out a specific class without a valid and substantial reason for making the law operate only against that class. Finally, Petitioners asserted that the ordinance violated constitutional principles by effectively endorsing the establishment of a sectarian religious practice.

Originally, the suit on appeal only addressed the issue of whether the trial court erred in denying the Petitioners' motion for a temporary injunction. However, during oral argument, both parties agreed to have the Florida First District Court of Appeal address the substance of the Petitioners' claims.

The District Court of Appeal addressed the substance of the Petitioners' claims and upheld the validity of the ordinance. However, the District Court did not apply the correct constitutional standards set by this

court. The District Court stated that counties had the power to regulate, and as a result, counties could enact ordinances prohibiting the sale of alcohol on Christmas Day. However, the District Court failed to recognize the Florida Supreme Court's precedent holdings that distinguish the power to regulate from the power to prohibit. Further, the District Court failed to address the apparent conflict created by its decision with Article VIII, Section 5, Florida Constitution.

The District Court also addressed the Petitioners' claims that the ordinance violated the Establishment Clause of the United States Constitution, as well as the Florida Constitution. The District Court recognized that the Lemon test, mandated by the United States Supreme Court, should be applied to determine whether the Clay County Ordinance violates the Establishment Clause. However, the District Court misapplied the

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Lemon test to uphold the ordinance providing for criminal punishment of persons whose religious beliefs do not compel them to abstain from selling alcohol on Christmas (see appendix for the decisions of the Circuit Court, District Court of Appeal, and Florida Supreme Court).

The Supreme Court of Florida declined to accept jurisdiction and denied the Petition for Review on April 12, 1995.

## REASONS FOR GRANTING THE WRIT

I. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c),PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, FAILS THE LEMON TEST, THEREBY VIOLATING THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The United State Supreme Court established a three prong test, commonly called the Lemon test, to determine whether a law violates the Establishment Clause. "[T]o pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive governmental entanglement with religion." Committee for Public Education v. Nyquist, 413 U.S. 756, 772-73, 93 S.ct. 2955, 2965-66, 37 L.Ed.2d 948 (1973). If the law in question fails any part of the test, it is unconstitutional.

Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). As recognized by the District Court, Article I, Section 3, Florida Constitution, adds the additional requirement that no public moneys may be authorized to aid any sectarian institution.

The District Court recognized the Lemon test as the proper Establishment Clause test. However, its application of the test led it to uphold the Clay County Ordinance, which has the purpose and effect of endorsing sectarian Christian practices and which entangles government in the process of monitoring and punishing the prohibited activity. The District Court should have followed the reasoning of the Connecticut Supreme Court, which held a similar statute unconstitutional because it prohibited the sale of alcohol on "Good Friday", as opposed to the Clay County Ordinance's "Christmas Day". Griswold v. State, 183 Conn. 552, 441 A.2d 16 (1981). The line of reasoning used

by the Connecticut Supreme Court in striking down the ordinance prohibiting the sale of alcohol on Good Friday, applies equally well to Christmas. "Christmas", like "Good Friday", celebrates a significant event for the Christian religion. As noted by the District Court, the abstention from alcohol is an important practice on these days for certain Christian denominations.

In Griswold, like the present case, the government claimed that secular interests motivated the ban on alcohol sales. However, the Connecticut Supreme Court recognized the religious historical background of the legislation and found that if the legislation had secular purposes, alcohol sales would have been banned on other days as well.

The District Court acknowledged the validity of the Griswold Court's reasoning. However, in its attempt to reconcile the Griswold holding, the District Court attempted to distinguish "Christmas Day" from

"Good Friday" because Christmas has more secular traditions than the Easter holiday.[1] The District Court's distinction is without merit because it was reviewing an ordinance enforcing a religious tradition, not a secular one.

This Court should take jurisdiction because the Clay County Ordinance does not simply set out Christmas Day as a holiday, it invokes the power of the government to conform the behavior of citizens to the religious practices of a sectarian group. If the ordinance did not exist, the sectarian group could still refrain from purchasing alcohol. It must exist then to conform the behavior of those who would otherwise purchase and sell alcohol on Christmas Day.

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1. To call the Christmas holiday season more secular than the Easter holidays is forgetting the "Easter Bunny", "Chocolate Bunnies", and Easter Egg hunts.

By enacting and enforcing the ordinance, Clay County has simply used the power of the government and threat of criminal prosecution against those citizens who do not conform their behavior regarding the sale of alcohol on a religious day. The intent of the ordinance is clearly to support sectarian religious groups endorsing Christian beliefs.

In construing the First and Fourteenth Amendments to the United States Constitution, the District Court did not require the ordinance to pass each element of the Lemon test as required by the United States Supreme Court. Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). Nor did the District Court uphold the requirement of Article I, Section 3, Florida Constitution, that no public moneys be used in the aid of any sectarian institution. Thus, this Court should grant jurisdiction and overturn the Clay County Ordinance because it violates the Establishment Clause of the United States

Constitution.

The only Federal decision clearly addressing the Griswold decision is found in footnote eighteen in Cammack v. Waihee, 932 F.2d 765, 781 (9th Cir. 1991), wherein the court was asked to construe Hawaii's declared state holiday on "Good Friday" as violating the Establishment Clause. In determining that it did not, the Ninth Circuit pointed out that in Griswold, there was government entanglement under the Lemon test because the State was forced to monitor alcohol sales on Good Friday and, in effect, "enforce observance of a religious holiday" by liquor licenses. This holding by the Ninth Circuit should be applied sub judice because the Clay County Ordinance is attempting to accomplish the same governmental endorsement of religion, however, on Christmas Day instead of Easter.

II. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN

THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, VIOLATES THE EQUAL PROTECTION CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This Court should grant jurisdiction to reaffirm the proper constitutional scrutiny to which prohibitive legislation must be subjected, as enumerated by the Florida Supreme Court in Moore v. Thompson. Moore v. Thompson, 126 So. 2d 543 (Fla. 1961). In Moore, an automobile dealer challenged the constitutional validity of Chapter 59-295, Laws of Florida, which provided in part:

> Section 1. It shall be unlawful for any person, firm or corporation licensed under Section 320.27, Florida Statutes, to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles, or to offer to buy, sell, trade or exchange new, used or second-hand motor vehicle or interest therein or any written instrument pertaining thereto, on the first day of the week, commonly called Sunday, or on legal holidays, commonly called New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas.

Moore, 126 So. 2d at 547. The circuit court issued a final decree finding the statute

constitutionally valid as an appropriate exercise of the legislative police power. Moore, 126 So. 2d at 544. On direct appeal, the Florida Supreme Court reversed the circuit court and held that the statute unconstitutionally prohibited a class of business from selling its products on Sundays and holidays, including Christmas, without showing that such a prohibition was necessary to protect the public welfare. Moore, 126 So. 2d at 552.

In Moore, the Florida Supreme Court acknowledged the state's power to regulate car dealers. However, the Florida Supreme Court applied the Equal Protection Clause contained in the Fourteenth Amendment and held the power to regulate does not encompass the power to prohibit a business from selling goods on a designated day. Moore, 126 So. 2d at 550. The Moore Court held that the proper Constitutional standard, contained in the Equal Protection Clause, to be applied to

laws that prohibit business transactions on a designated day is, "that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all." Moore, 126 So. 2d at 543. The Florida Supreme Court applied the "valid and substantial reason" scrutiny to the statute and held that sufficient justification did not exist to single out the automobile business for prohibitive treatment.

In the present case, the First District Court of Appeal reached the opposite result from the Moore decision by upholding the ordinance and refusing to apply the constitutional standards and reasoning established by this Court. Silver Rose Entertainment, Inc. v. Clay County, No. 93-4154, slip op. at 11. The District Court relied solely on the county's power to regulate to uphold the prohibitive ordinance. The District Court found the general power to

regulate made further scrutiny of the ordinance unnecessary. However, the District Court's analysis indicates that it failed to recognize the key distinction between the cases it relied upon and the Florida Supreme Court's decision in Moore.

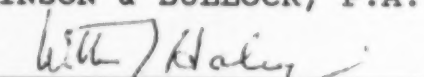
In Moore, as in the instant case, the Clay County Ordinance prohibits a class of commercial transactions on a designated day and renders certain businesses not equal to others. In the cases cited by the District Court, the statutes or ordinances merely regulated the business "in the premises." Moore, 126 So. 2d at 551. As the Florida Supreme Court made clear in Moore, "the power to regulate does not encompass the power to prohibit." Moore, 126 So. 2d at 550. Thus, this Court should grant jurisdiction and overturn the Clay County Ordinance because it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by

prohibiting the sale of alcohol on a religious holiday while not prohibiting the sale of other products on the same day.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of the foregoing have been furnished to **Mark H. Scruby, Esquire**, Post Office Box 1366, Green Cove Springs, FL 32043, and **John Kopelousos, Esquire**, Post Office Box 562, Orange Park, FL 32067-0562 by U.S. Mail on this 21st day of August, 1995.

BRANNON, BROWN, HALEY,
ROBINSON & BULLOCK, P.A.



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# APPENDIX

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY,
FLORIDA

CASE NO: 93-2425 CA

DIVISION: A

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation,

Plaintiffs,

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County,

Defendants.
_____/

**ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

THIS CAUSE came to be heard on the Plaintiffs' Verified Motion for Temporary Injunction filed in the above-styled cause. The cause was filed in this Court on Friday, December 17, 1993, and the hearing on the motion was held at 4:15 P.M., on the

following Tuesday, December 21, 1993. At the hearing all parties appeared through their respective counsel and were heard. In short, the Plaintiffs seek to have the Defendant Clay County and the Sheriff enjoined from enforcing Section 3-2, Clay County Code, which prohibits the sale of alcoholic beverages on Christmas Day.

Based upon the evidence and arguments presented at said hearing the Court makes the following findings of fact and conclusions of law:

1. The Plaintiffs advanced two separate arguments in support of this motion, one based on the assertion that Section 562.14, Florida Statutes, only authorizes the County to regulate the hours of sale, but not to prohibit sales on a particular day; and the other based on the contention that prohibiting sales on Christmas Day violates the establishment Clause of the First Amendment to the Constitution of the United States, made applicable to Clay County

through the Fourteenth Amendment, and Article 1, Section 3 of the Constitution of the State of Florida.

2. In presenting a petition for a temporary injunction, the Plaintiffs carry a heavy burden: to establish that their entitlement is clear, reasonably free from doubt, and necessary to prevent great and irreparable injury. They must both plead and prove their entitlement. Such relief should only be granted sparingly and cautiously.

3. Regarding the first argument, concerning Section 562.14, Florida Statutes, the Court finds first that it was neither alleged in the Complaint nor advanced in the Verified Petition; as such it was not properly before the Court for consideration, nor were the Defendants given any notice (such as it was) that such position would be asserted. The Court finds second that the Statute on its face does not appear to forbid the County from prohibiting the sale of alcohol on a particular day. This appears to

be consistent with the case submitted by the Plaintiffs: Hardage v. City of Jacksonville Beach, 399 So. 2d 1077 (Fla. 1st DCA 1981). There, the First District Court of Appeal expressly upheld the validity of the total ban on sales of alcohol on Sunday with the exception of certain establishments, with respect to an ordinance adopted under the authority of a statute which only referred to regulating location, hours and sanitary conditions of establishments serving alcohol. The Court finds third that the Defendant County's ordinance does, in fact, prohibit hours of sale which, in the case of Christmas Day, includes the entire twenty-four hour period.

4. Regarding the Plaintiffs' second argument, concerning the constitutionality of the Christmas Day sales ban, the Court finds that the Plaintiffs have failed to carry their burden. With respect to the Establishment Clause of the First Amendment, the Plaintiffs assert that the County's

ordinance has an unconstitutional purpose, effect and, from an enforcement standpoint, entanglement. Counsel for the Plaintiffs and the Defendant, Clay County, agreed that no Establishment Clause case in any jurisdiction pertaining to an alcohol sales ban on Christmas Day was discovered by either. The Plaintiffs, however, assert that the decision of the Connecticut Supreme Court in Griswold Inn, Inc. v. State of Connecticut, 441 A.2d 16 (Conn. 1981), is controlling. There, a statute had prohibited the sale of alcohol on Good Friday. In striking down the statute as violative of the Establishment Clause, the court referred to the three prong test first enunciated by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), as conformed in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). That test prohibits a regulation which either (1) has as its purpose the advancement of a sectarian worship objective; (2) has as its primary effect the advancement of a sectarian worship

objective; or (3) leads to excessive entanglement between valid state objectives (i.e., enforcement) and sectarian, religious matters. The Court is unable to conclude that Griswold is a sufficiently comparable case to clearly entitle the Plaintiffs to relief, or to demonstrate the likelihood that they will ultimately prevail on the merits. To the contrary, there is substantial reason and case law to consider Christmas Day today as largely a secular holiday (with undeniably religious origins), but to consider Good Friday as primarily if not entirely sectarian in nature with no secular tradition. See, Lynch v. Donnelly, 465 U.S. 668 (1984), wherein the United State Supreme Court took great pains to demonstrate that Christmas in our society has taken on a largely secular tradition in concluding that a certain city's creche display was not unconstitutional. See also, Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991); pet. for rehearing and for rehearing en banc denied, 944 F.2d 466 (9th

Cir. 1991), wherein the Ninth Circuit Court of Appeals upheld a Hawaiian statute declaring Good Friday to be a legal paid holiday for state employees, but lengthy dissents all took pains to distinguish Good Friday as a day of purely sectarian significance to certain religions with no secular tradition, specifically as opposed to such days as Christmas, with strong and long-time secular holiday observance traditions.

5. Based strictly upon the matters presented at the hearing, and the burden held by the Plaintiffs, and without reaching to the ultimate merits of the Complaint, the Court is unable to conclude that the Plaintiffs have clearly established unconstitutional entanglement. With Christmas Day being recognized by the United States Supreme Court as primarily a secular holiday, the Court takes note that the same Court has upheld certain Sunday blue sky laws or closing day laws in McGowan v. Maryland, 366 U.S. 420 (1961), against Establishment

Clause challenge after concluding that Sunday, is a day of rest beyond its religious origins as the Sabbath. The Court concluded that the state had an interest in establishing such a day of rest to advance the health, safety and welfare of the public. In the instant matter, this Court for purposes of temporary injunction, finds that the Plaintiffs have failed to clearly establish that the alcohol sales ban on Christmas Day has no secular purpose, a day already determined to have a strong and long secular tradition. To the contrary, the Defendant Clay County offered evidence suggesting that Christmas is a particularly deadly time of year from the standpoint of traffic safety in the State of Florida, with a high incidence of highway fatalities related to alcohol abuse. The Court is not at this time persuaded that the Defendant Clay County clearly cannot prohibit alcohol sales at such a deadly time, when the highways are usually crowded with travellers

perhaps hastening to visit family, friends, and relatives, to meet in fellowship, express good will and exchange gifts as is the holiday tradition; or perhaps even to worship. Moreover, this Court is not unmindful of the large number of domestic violence cases which enter the criminal justice system, and the fact that alcohol abuse is too often an accelerant to such violence. As counsel for the Defendant, Clay County, suggested, Christmas Day is often a day when families come together by tradition, although such coming together may not always be amicable.

6. The Court is not persuaded that for purposes of a temporary injunction the Plaintiffs have clearly established unlawful entanglement. Suffice it to say that if Sunday blue laws are enforceable under McGowan because of Sunday's secular tradition, then it would seem that an alcohol sales ban on Christmas Day with its secular tradition, is at least equally and easily

enforceable.

7. Finally, the Court is not persuaded, again merely for the purposes of a temporary injunction, that the Plaintiffs have clearly established irreparable injury. The ordinance has been in effect for 14 years without apparent challenge. The Plaintiffs and others similarly situated have not chosen to challenge the same all these years (although Christmas Day surely fell on Saturday in other years during that span). Rather, the Plaintiffs have chosen to seek an injunction on the very eve of Christmas in 1993. With respect to a holiday that has been observed from time immemorial by both public and private sector employees, this Court is not persuaded that the Plaintiffs have carried their heavy burden to grant a temporary injunction. With respect to the Plaintiffs' assertion that the Florida Constitution is even more restrictive than the Federal, this Court is not persuaded at this time that a separate establishment

clause jurisprudence exists, notwithstanding Moore v. Thompson, 126 So. 2d 543 (Fla. 1961) (wherein the Florida Supreme Court struck down a Sunday prohibition of motor vehicle sales, finding that the reasons advanced were inadequate to invoke the police powers of the State to so regulate).

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED

That the Plaintiffs' Petition for Temporary Injunction be, and hereby is denied. This Order should not be read as a final adjudication on the merits of the Complaint filed herein, but is merely limited to the narrow question of whether the Plaintiffs have carried their heavy burden to show entitlement to a temporary injunction.

DONE AND ORDERED, in Chambers, Green Cove Springs, Florida, this 22 day of December, 1993.

/s/
William A. Wilkes
Circuit Judge

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED.

CASE NO. 93-4154

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation,

Appellants,

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County,

Appellees.

_____/

Opinion filed November 22, 1994.

BENTON, J.

We are asked to declare unconstitutional on its face a county ordinance outlawing the sale of alcohol on "Christmas day and Christmas night." Appellants contend that the ordinance violates constitutional

prohibitions against the establishment of religion.[1] We conclude that Christmas, notwithstanding its deep religious significance for many, also has secular traditions which local government is free to acknowledge, without offending the constitutions either of Florida or of the United States. We affirm the order denying plaintiffs' motion for temporary injunction, and uphold the ordinance.

Procedural History

Alleging themselves licensed to sell alcoholic beverages in unincorporated Clay County, appellants filed in the circuit court

[1] The first amendment to the United States Constitution, made applicable to the States by the Fourteenth, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 2d 711 (1946), provides that "Congress shall make no law respecting an establishment of religion ..." Article I, section 3 of the Florida Constitution provides:

> There shall be no law respecting the establishment of religion .... No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.

seeking an injunction against the enforcement of Section 3-2(c), Clay County Code, on grounds that the ordinance "in effect, force[s] the observance of a religious holiday by liquor licensees[,] ... violates the [E]stablishment [C]lause ... and ... Article I, Section 3, of the Florida Constitution ...[,] advances religion in general, and particularly the Christian religion ... and ... results in entanglement between religion and state."

With exemplary alacrity fully appropriate to the importance of the Constitutional questions raised, the trial court scheduled a hearing for December 21, 1993, on appellants' verified motion for temporary injunction, which was filed along with the complaint on December 17, 1993.

At the hearing for the first time, as a separate basis for relief, appellants urged the County has no authority to regulate the days on which purveyors of alcoholic beverages may open for business, on account

of Section 562.14, Florida Statutes (1993). Even though this contention had not been set out in the complaint or in the verified motion for temporary injunction, the trial court's comprehensive order denying plaintiffs' motion for temporary injunction, entered the day after the hearing, reached the merits of appellants' belated statutory argument, ruling that the statute did not preclude the challenged ordinance.

An earlier effort to obtain review of the order denying plaintiffs' motion for temporary injunction on an emergency basis proved unavailing. In an unreported order entered on December 23, 1993, another panel of this court denied appellants' emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order or, alternatively, for an order granting petitioner's temporary restraining order "without prejudice to the right of petitioners/appellants to pursue

their appellate remedies in this case in accordance with Florida Rule of Appellate Procedure 9.130."

Decision Sought

We now have for review the order denying plaintiffs' motion for temporary injunction. Fla. R. App. P. 9.130(a)(3)(B). In that ostensibly preliminary order, the trial court addressed the questions which must be resolved to decide the merits of the controversy. Consideration of the merits in this context was necessary because temporary injunctions should not

> be entered in the absence of a substantial likelihood that the party seeking the injunction is entitled to relief on the merits. Such a likelihood is required under Florida law.... It is not enough that a merely colorable claim is advanced.
>
> Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested. See, e.g., Oxford International Bank and Trust, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54 (Fla. 3rd DCA 1979), cert. dismissed, 383 So. 2d 1199 (Fla. 1980).

Mid-Florida at Eustis, Inc. v. Griffen, 521 So. 2d 357 (1988).

City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 753 (Fla. 1st DCA 1994), review granted, Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville, (Fla., Sep 06, 1994) (Table, No. 83,734). It is one thing to consider the merits, and another to decide them. The grant or denial of a temporary injunction does not ordinarily

> decide the merits of the case unless (1) the hearing is specially set for that purpose, [and] (2) the parties have had a full opportunity to present their cases, University of Texas v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981), and a denial of a preliminary injunction or reversal of an order granting same does not preclude the granting of a permanent injunction at the conclusion of a full hearing. Hialeah, Inc. v. B & G Horse Transportation, Inc., 368 So. 2d 930 (Fla. 3d DCA 1979).

Ladner v. Plaza Del Prado Condominium Ass'n, Inc., 423 So. 2d 927, 929 (Fla. 3d DCA 1982). At oral argument in the present case, however, appellate counsel joined in a request that the case be decided on the

present record. Counsel for plaintiffs below specifically waived the right to offer further evidence, in effect conceding that plaintiffs "have had a full opportunity to present their cases." In these circumstances, considerations of judicial economy militate in favor of reaching the merits of the parties' contentions.

Hours of Sale

In keeping with the rule of decision which forbids reaching constitutional questions when cases can be disposed of on statutory grounds, we turn first to plaintiffs' statutory claim. Appellants contend that Florida counties lack authority under the beverage laws to forbid the sale of alcoholic beverages for an entire day, although they concede that Clay County can limit the hours of sale for alcoholic beverages on particular days in unincorporated portions of the county.

This contention flies in the teeth of the controlling statutes. To the extent not

inconsistent with general law, Clay County is authorized to:

> Establish and enforce regulations for the sale of alcoholic beverages in the unincorporated areas of the county pursuant to general law.

§ 125.01(1)(o), Fla. Stat. (1993). Pertinent general law contemplates that courts will set and "be responsible for the enforcement of the hours of sale established by county or municipal ordinance," § 562.14(2), Fla. Stat. (1993), and provides:

> Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business...of any licensee under the Beverage Law within the county or corporate limits of such municipality.

§562.45(2)(a), Fla. Stat. (1993). In Hardage v. City of Jacksonville Beach, 399 So. 2d 1077 (Fla. 1st DCA 1981), review denied, 411 So. 2d 382, we upheld an "ordinance which bans the sale of alcoholic beverages on Sunday with certain exceptions." Hardage, 399 So. 2d at 1078. None of the exceptions inured to Hardage's benefit. We upheld the

ban there even though that ordinance permitted Sunday sales by certain of Hardage's competitors. But cf. Moore v. Thompson, 126 So. 2d 543 (Fla. 1960).

Our decision in City of Jacksonville v. C.J. Ventures, Inc., 558 So. 2d 133 (Fla. 1st DCA 1990) stands for the unremarkable proposition that enforcement of an ordinance (whatever the subject matter) is properly enjoined where "the ordinance in question violates the due process provisions of the Fifth Amendment of the Constitution of the United States, " C.J. Ventures, 558 So. 2d at 135, because "it provides for no standards or criteria upon which the Sheriff is to make," id., decisions as to who is in compliance.

Florida Constitutional Rights

"When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." Traylor v. State,

596 So. 2d 957, 962 (Fla. 1992) (footnote omitted). "To be held constitutional, the instant [ordinance] must pass muster under both the federal and state constitutions." In re T.W., 551 So. 2d 1186, 1190 (Fla. 1989).

Appellants contend that "the Florida Supreme Court appears to have held that any statute premised upon the requirement that a business closed on Sunday, Christmas, or any other religious days is unconstitutional as abridging the separation of Church and State Doctrine." Initial Brief, at 17. We do not read the decision in Moore v. Thompson, 126 So. 2d 543 (Fla. 1960), on which appellants rely,[2] for such a broad proposition. At issue in Moore was the validity of a statute forbidding motor vehicle dealers to do business on Sundays or legal holidays, including Christmas.

Although Justice Drew's opinion for the

[2] Appellants also cite Kelly v. Blackburn, 95 So. 2d 260 (Fla. 1957) and Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952).

court recounts at some length the history of blue laws in Florida, the Moore court's invalidation of a Sunday closing statute, which affected car dealers but no other businesses, rested on notions of equal protection. The opinion quoted from the precedent on which it chiefly relied:

> We reached the conclusion in Henderson that such statutory provisions were unconstitutional, since the distinctions made in them between businesses permitted to operate on Sunday and those which were prohibited from operating were wholly arbitrary and made without a reasonable basis for upholding them as a valid exercise of the police power. We disposed of the Kelly case on the authority of the Henderson case, re-affirming and holding decisive of the question presented the following language in that case:
>
> > It may be said that the closing of all business houses on Sunday, except in cases of emergency, bears a rational and reasonable relationship to the public health, safety, morals or general welfare because thereby protection is afforded all citizens from the evils attendant upon uninterrupted labor. Nevertheless, it does not

follow that laws containing the exemption of many business and vocations, such as the legislative enactments now under consideration, can be said to bear such relationship to the public health, safety, morals or general welfare as to declare them to be valid general laws (although they may be general laws in the sense that they are effective in each and every county of the State) simply because they operate equally upon all within a certain class or classes. It is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all. State ex rel. Pennington v. Quigg, 94 Fla. 1056, 114 So. 859; Mayo v. Polk Co., 124 Fla. 534, 169 So. 41, appeal dismissed Polk Co. v. Mayo, 299 U.S. 507, 57 S. Ct. 39, 81 L. Ed. 376; Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d 638; Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664; City of Denver v. Bach, 26 Colo. 530, 58 P. 1089, 46 L.R.A. 848.

It is not suggested that the parties who work on used car lots need

protection from being cajoled into uninterrupted labor more than do citizens who are engaged in any of the exempt businesses or vocations. We can think of no reason, and none has been suggested to us, why the health, safety, morals or general welfare of our citizens would be safeguarded to any greater degree by requiring used car dealers to close their places of business on Sunday than such rights or guaranties would be safeguarded were such persons allowed to do business on the Sabbath along with proprietors of tourist attractions. Nor is it clear to us that any reasonable basis exists for exempting parking lots and filling stations from the operation of these so-called 'Sunday Closing Laws' and not exempting garages. Such distinctions appear to be nebulous, wholly arbitrary and are made without a reasonable basis for upholding them as a valid exercise of the police power. Indeed, each of these distinctions fits into the category of a "distinction without a difference."

Moore, 126 So. 2d at 546-47 (emphasis in original). In invalidating the statute in Moore, just as it had invalidated two predecessor statutes seeking to accomplish the same end, the Supreme Court said:

> We hold the "valid and substantial reason" [62 So. 2d 9] yardstick has not been met which would allow the Legislature to make such a law operate only upon this certain class of business, rather than generally upon all.

Moore, at 551. Subsequent case law has confirmed the essentially "equal protection" basis for the court's decision in Moore. E.g., Rollins v. State, 354 So. 2d 61, 63 (Fla. 1978).

Appellants' attack on Clay County's ordinance, predicated on the line of cases culminating in Moore, boils down, therefore, to an assertion that there is no "valid and substantial reason" for regulating the hours of sale of alcoholic beverages, when no other enterprise is so restricted. But this type of discrimination against purveyors of alcoholic beverages is the rule rather than

the exception. No case of which we are aware has held that an ordinance "violates the state and federal guarantees of equal protection of the laws," Shevin v. Bocaccio, Inc., 379 So. 2d 105, 106 (Fla. 1979), because it "applies only to alcoholic beverage licensees and their employees." Id.

> The dictates of due process and equal protection, related in regulation of this type, require only that the statutory means of regulation be rationally related to the statutory objective, and that the members of the regulated class be treated equally. Soverino v. State, 356 So. 2d 269 (Fla. 1978); Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976).

Id. Clay County's "power to regulate conditions in licensed premises is derived from [the state's] power to totally prohibit sales [of alcoholic beverages.]" City of Daytona Beach v. del Percio, 476 So. 2d 197, 201 (Fla. 1985). "The Florida Constitution and the statutes...imbue the C[oun]ty with the state's full police powers, including those under the twenty-first amendment." Id.

Religious Establishment Claimed

Under both the Florida and federal constitutions, appellants raise the question whether banning the sale of alcoholic beverages on Christmas amounts to a tacit endorsement or establishment of Christianity as an official religion. With the exception of Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) and Larson v. Valente, 456 U.S. 228, 72 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), the United States Supreme Court has, since their formulation, applied the three tests articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971). These three issues must also be addressed in deciding the Florida constitutional question. To these tests, moreover, Article I, Section 3 of the Florida Constitution adds a fourth: The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution. Any statute that passes muster under article I, section 3 of the Florida Constitution necessarily meets

the federal Establishment Clause tests.

Governmental support of religion need not be monetary to offend article I, section 3 of the Florida Constitution. No less than its federal counterpart, the Florida provision "was intended to protect against sponsorship...and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970). Predecessor provisions[3] were the basis for decision in

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[3] At the time of the Brown decision, Florida's "establishment clause" provided:

> No preference shall be given by law to any church, sect or mode of worship and no money

shall ever be taken from the treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.
Art. 1, § 5, Fla. Const. (1885). The "free exercise clause" appeared separately:

> The free exercise and enjoyment of religious profession and worship shall for-ever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify

licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society.

Originally, as now, both ideas had appeared in a single provision of the Declaration of Rights, article 1, section 3 of the Florida Constitution of 1838:

> That the great and essential principles of liberty and free government may be recognized and established, we declare:
>
> ...
>
> 3. That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; and that no preference shall ever be given by law, to any religious establishment, or mode of worship in this State.

The same unified, theistic formulation appeared in the Florida Constitution of 1865. The Constitution of 1868 initiated the separate treatment of free exercise and establishment that persisted in the Constitution of 1885:

> 4. The free exercise and enjoyment of religious profession and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the State.
>
> 23. No preference can be given by law to any church, sect, or mode of worship.

Declaration of Rights, §§ 4, 23, Fla. Const. (1868).

Brown v. Orange County Board of Public Instruction, 128 So. 2d 181 (Fla. 2d DCA 1960), in which the court held that the

> distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts. This distribution likewise would tend to impair the rights of plaintiffs and their children to be free from governmental action which discriminates in the free exercise of religious belief.

Brown, 128 So. 2d at 185. Even in the absence of the expenditure of public moneys, the Florida Constitution proscribes governmental "endorsement" of religious groups, partly on the theory that such official sanction may interfere with other groups' free exercise of religion.[4]

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

---

[4] There is no distinct claim here, however, that the challenged ordinance has the purpose or effect of impeding appellants' free exercise of religion.

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Our constitutions, state and federal, reflect the view that a "union of government and religion tends to destroy government and degrade religion." Engel v. Vitale, 370 U.S. 421, 431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). In nearly identical language, the Florida and federal constitutions each proscribe laws respecting any official establishment of religion.

Because the challenged ordinance has no explicit statement of purpose, we are left to infer its purposes. One apparent purpose is to encourage a respite from work, making family activity on Christmas Day possible. To that extent, McGowan v. Maryland, 366 U.S. 420, 452, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), fully answers the contention that

Christmas' historical religious significance renders the ordinance unconstitutional. "People of all religions and people with no religion regard [Christmas no less than] Sunday as a time for family activity, for visiting friends and relatives,...and the like." McGowan, 366 U.S. at 452. "To say that the States cannot prescribe [Christmas as well as] Sunday as a day of rest for these purposes solely because centuries ago [or even more recently] such laws had their genesis in religion would give a constitutional interpretation of hostility to religion rather than one of mere separation of church and state." McGowan, 366 U.S. at 445.

Along with the putative purpose to encourage purveyors of alcohol to rest from their labors on Christmas, in order to spend time with their families, the ordinance evinces another apparent purpose: To discourage consumption of alcohol on Christmas. Neither of these seeming

purposes[5] run afoul of the state and federal constitutional prohibitions against governmental establishment of religion. If the primary or "actual" purpose of Clay County's ordinance is to commemorate or set apart Christmas as a religious holy day, the ordinance must fall. But "[t]his does not mean that the law's purpose must be unrelated to religion, "Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987), in the sense of ignoring that friends and families may prove accessible because they refrain from work on Christmas, albeit for religious reasons. Plaintiffs failed to establish at the hearing that some prohibited purpose motivated adoption of the ordinance, and we are unwilling to presume any unconstitutional motive.

[5] It is true, of course, that the ordinance mandates neither rest nor abstinence. Vendors of alcoholic beverages are free to sell food or other wares on Christmas, or to take stock of inventory. Clay Countians intent on imbibing eggnog on Christmas Day can acquire bourbon or rum ahead of time.

We recognize that abstinence from alcohol is a religious tenet for some. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed 2d 297 (1982). On the other hand, sacramental wine is an essential part of Christmas observance in certain Christian traditions, observance which this ordinance could conceivably make more difficult. In any event, we are unable to discern any religious principle that the ordinance under challenge endorses. We are aware of no religious sect that advocates nor any religious teaching to the effect that alcohol should be consumed or be readily available on every day of the year other than Christmas.

Whatever its purposes, no ordinance can pass constitutional muster if its principal or primary effect is to advance religion. We find no such effect here. This ordinance authorizes no expenditure in aid of any institution, sectarian or otherwise. The ordinance does nothing to entangle government

with religion in a constitutionally impermissible way.

> The entanglement which is forbidden is comprehensive, discriminating and continuing state surveillance, Lynch, 465 U.S. at 684, 104 s. Ct. at 1365, 79 L. Ed. 2d at 617; day-to-day surveillance or administration of religious activities, Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 252-53, 110 S. Ct. 2356, 2373, 110 L. Ed. 2d 191, 217 (1990); and programs whose very nature are apt to entangle the state in the details of administration, Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112, 19 L. Ed. 2d at 757.

Todd v. State, __ So. 2d ___, ___ (Fla. 1st DCA 1994), 19 FLW D1804, Aug. 22, 1994. Nothing of the kind is involved here. In forbidding the sale of alcohol on Christmas Day and Christmas night, Clay County's ordinance does not, as a matter of Florida constitutional law, show "favoritism...towards citizens based on their personal religious choices...[nor] endorse the religious practices and beliefs of some citizens." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh

Chapter, 492 U.S. 573, 627, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (O'Connor, J., concurring).

The Supreme Court of Connecticut found certain Connecticut statutes "unconstitutional in that they prohibit the sale of alcoholic beverages on Good Friday, in violation of...the first and fourteenth amendments to the United States Constitution." Griswold v. State, 183 Conn. 552, 558, 441 A.2d 16 (1981). But see Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) (declaring Good Friday a state holiday does not offend the Establishment Clause). While we have no quarrel with the conclusions reached by the Griswold court (and the dissent in Cammack), whether as a matter of federal or of Florida constitutional law, we conclude that, unlike Good Friday, Christmas enjoys a special constitutional status by virtue of the secular traditions associated with it. The same is true of Thanksgiving, and even of Halloween. See Guyer v. School

Bd. of Alachua County, 634 So. 2d 806 (Fla. 1st DCA 1994).

Section 3-2(c), Clay County Code, does not offend Article I, Section 3 of the Florida Constitution, nor, a fortiori, the Establishment Clause of the First Amendment to the United States Constitution. The proposition that any law that recognizes or sets apart Christmas in any way amounts to an unconstitutional, official expression of approval of Christianity is not tenable. County of Allegheny; Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). No less an authority than Justice Brennan tells us that "public designation of Christmas Day as a holiday is constitutionally acceptable," Lynch, 465 U.S. at 710, because "the Christmas holiday in our national culture contains both secular and sectarian elements." Id. (Brennan, J., dissenting) (footnote omitted).

AFFIRMED.

ZEHMER, C.J., and KAHN, JR., CONCUR.

**SUPREME COURT OF FLORIDA**

WEDNESDAY, APRIL 12, 1995

CASE NO. 84, 875

District Court
1st District - No. 93-4154

SILVER ROSE ENTERTAINMENT, INC., etc., et al.,

Petitioners,

v.

CLAY COUNTY, etc., et al.,

Respondents.

* * * * * * * * * * * * * * *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN and HARDING, JJ., concur
ANSTEAD, J., dissents

BHP
cc: Hon. Jon S. Wheeler, Clerk
Hon. John Keene, Clerk
Hon. William A. Wilkes,Judge

Stephen C. Bullock
Edward K. Cottrell
Alan K. Ragan
Frances J. Moss
Mark H. Scruby
John Kopelousos

A True Copy

TEST

By:
Deputy Clerk
Sid J. White
Clerk, Supreme Court

Supreme Court, U.S.
FILED
SEP 19 1995
CLERK

(2)

# NO. 95-327

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1995**

SILVER ROSE ENTERTAINMENT, INC., A FLORIDA CORPORATION, ET AL.,

Petitioners,

vs.

CLAY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, ET AL.,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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## RESPONDENT CLAY COUNTY'S BRIEF IN OPPOSITION

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46pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict exists between the decision for which review is sought and the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981), within the meaning of Rule 10.1(b), Rules of the Supreme Court.

2. Whether the Supreme Court of the United States should grant a petition for a writ of certiorari to review a decision of the First District Court of Appeal of the State of Florida that Section 3-2 of the Clay County Code, Clay County, Florida, prohibiting the sale of alcoholic beverages on Christmas, does not on its face violate the establishment clause of the First Amendment to the Constitution of the United States.

3. Whether the equal protection issue asserted by the Petitioners in their petition for a writ of certiorari was timely and properly raised in the state court proceedings so as to give the Supreme Court of the United States a jurisdictional basis to review by writ of certiorari a decision of the First District Court of Appeal of the State of Florida.

4. Whether the Supreme Court of the United States should grant a petition for a writ of certiorari to review a decision of the First District Court of Appeal of the State of Florida, which decision the Petitioners assert to have definitively and affirmatively held that Section 3-2 of the Clay County Code, Clay County, Florida, prohibiting the sale of alcoholic beverages on Christmas, does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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Section 3-2, Clay County Code, Clay County, Florida ..... i, 5, 6

## ORDERS AND OPINION BELOW

In the trial court, the circuit judge of the Fourth Judicial Circuit, Clay County, Florida, entered an unreported order denying plaintiffs' motion for temporary injunction on December 22, 1993 (P.A. at A-1). On December 23, 1993 the First District Court of Appeal of the State of Florida entered an unreported order denying an emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order [sic] or, alternatively, for an order granting temporary restraining order. Subsequently the First District issued an opinion affirming the trial court's order on November 22, 1994 (P.A. at A-12). This opinion is reported as *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246 (Fla. 1st DCA 1994). The Supreme Court of Florida issued an order denying review of the First District's opinion on April 12, 1995, reported at ___ So. 2d ___ (Fla. 1995) (P.A. at A-38).

A review of the First District's opinion reproduced by the Petitioners in the appendix to their petition for a writ of certiorari reveals at least one typographical error (P.A. at 21) and one omission of substance (P.A. at 27). A correct rendering of the text of the First District's opinion with regard to the error and the omission is set forth in the reported decision *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 249 and 251, respectively.

## JURISDICTION

Nowhere in the Petitioners' jurisdictional statement is mention made regarding any federal question arising under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Yet much of the

reasoning being urged upon the Court to issue a writ of certiorari digresses into putative equal protection concerns. The Respondent County (the County) submits that, in addition to the several reasons that the Court should decline jurisdiction set forth elsewhere in this brief in opposition, the Petitioners' failure to identify equal protection in their jurisdictional statement should preclude contemplation of equal protection *ab initio*. Otherwise, the County does not dispute the Petitioners' rendering of the jurisdictional grounds under which the Supreme Court may grant their petition.

The only decision which can be reviewed under 28 U.S.C. § 1257 is *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d 246 (Fla. 1st DCA 1994). The County agrees that the First District's decision is from a state court of last resort within the meaning of Rule 10.1(b), Rules of the Supreme Court. The County does not agree that Rule 10.1(b) has application to the jurisdictional question in that *Silver Rose Entertainment* does not conflict with the decision of another state court of last resort.

## ADDITIONAL CONSTITUTIONAL PROVISION AND RULES INVOLVED

In addition to the constitutional provisions, statute, ordinance and rule set forth in the petition for a writ of certiorari, the County submits that the following constitutional provision and rules are involved in this case:

U.S. CONST. amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Rule 14.1(h), Rules of the Supreme Court:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

Rule 15.1, Rules of the Supreme Court:

> A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in

> opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. (emphasis as in original)

## STATEMENT OF THE CASE

The Petitioners' statement of the case is an unfortunate olio combining large measures of argumentative material, irrelevant assertions, and substantial inaccuracies with small portions of information suitable to a statement of the case. Moreover, the Petitioners' statement of the case omits any information regarding the federal questions sought to be reviewed as required under Rule 14.1(h), Rules of the Supreme Court.

In accordance with Rule 15.1, Rules of the Supreme Court, the County must identify material misstatements of fact asserted in the Petitioners' statement of the case. First,

the assertions in the first paragraph and in the second and third sentences of the second paragraph of the statement are false because nowhere in the trial court or before the First District did the Petitioners raise or argue any equal protection issue. Second, the fourth paragraph is argumentative and addresses only non-federal questions. Third, the last sentence of the fifth paragraph is argumentative and mischaracterizes the establishment clause issue. Because the Petitioners' statement of the case is rife with misstatement and argument, the County rejects said statement in its entirety and submits the statement set forth below.

The Petitioners comprise a group of commercial establishments licensed to sell alcoholic beverages in Clay County, Florida. In December, 1993, the Petitioners filed a civil action in the Circuit Court of the Fourth Judicial Circuit of Florida, naming the County and the Respondent Sheriff of Clay County as defendants. The complaint alleged that the portion of Section 3-2 of the Clay County Code prohibiting the sale of alcohol on Christmas violates the establishment clause of the First and Fourteenth Amendments to the Constitution of the United States. The Petitioners sought injunctive and declaratory relief (R.A. at A-1).

Following a hearing on the Petitioners' verified motion for temporary injunction and memorandum of law (R.A. at A-7) the circuit court entered its order denying plaintiffs' motion for temporary injunction (P.A. at A-1). The Petitioners sought immediate review by the First District, filing a notice of appeal together with an emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order [sic] or, alternatively, for an order granting temporary restraining order. By unreported order of the First District

dated the next day, this emergency petition was denied without prejudice to the right of the Petitioners to pursue their appeal of the circuit court's order of denial as a non-final order under the applicable rules of appellate procedure. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 247-48, (P.A. at A-15-16).

In due course the issue was briefed and argued before the First District. Although the proceeding concerned a non-final order, at oral argument before the First District the Petitioners proposed that the court rule on the constitutional issue on the merits and as a matter of law. The County agreed it was willing to have the First District decide, as a matter of law, whether Section 3-2(c) of the Clay County Code on its face violated the establishment clauses of the state and federal constitutions. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 248, (P.A. at A-17-18). The establishment clause was the only issue properly before the trial court and the First District. The First District issued its written opinion on November 22, 1994, upholding the constitutionality of Section 3-2(c) of the Clay County Code.

The Petitioners timely filed their notice to invoke the discretionary review jurisdiction of the Supreme Court of Florida on December 22, 1994. The court denied review by order dated April 12, 1995 (P.A. at A-38).

The Petitioners timely filed their petition for a writ of certiorari in the Supreme Court of the United States on July 11, 1995. This brief in opposition is filed in response to the petition on behalf of the County.

## SUMMARY OF ARGUMENT

1. No conflict exists between the decision sought to be reviewed and the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981). In *Griswold Inn,* the court held a statute prohibiting the sale of alcohol on Good Friday unconstitutional under the establishment clause. Good Friday was identified in *Griswold Inn* as a religious holy day characterized by solemn sectarian observance without any secular tradition. On the other hand, the Christmas alcohol sales ban upheld below by the First District involves a day long recognized as having a secular tradition wholly removed from its sectarian origins. The restrictive regulation on its face does not disclose any unconstitutional purpose.

2. The First District correctly articulated the establishment clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The First District properly applied the *Lemon* test in light of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984), wherein the Court found Christmas to be a day long observed as a secular holiday. No special and important reasons exist for the Court to revisit *Lemon* or to review its application to the Christmas alcohol sales ban sustained below.

3. The Petitioners failed to raise any semblance of an equal protection challenge to the alcohol sales ban in the trial court or before the First District. Hence the certiorari jurisdiction of this Court under 28 U.S.C. § 1257 cannot lie as a matter of law.

4. The equal protection challenge raised by the Petitioners for the first time in this Court is misplaced. The

proper equal protection test for restrictive legislation in the area of economics and social welfare is that it be rationally based and free from invidious discrimination. *Dandridge v. Williams*, 397 U.S. 471 (1970). The alcohol sales ban considered below does not violate the equal protection clause under this test. This Court has previously upheld the constitutionality of a blue law prohibiting the sale on Sunday of certain commodities, including alcoholic beverages, against an equal protection challenge. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). With particular regard to restrictive regulations on the sale of alcoholic beverages, the Twenty-first Amendment provides even greater power to the regulating authority in matters that might otherwise be protected under the Constitution. The Petitioners' untimely equal protection challenge is merely a repackaging of their establishment clause claim.

## REASONS THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE SUPREME COURT OF CONNECTICUT IN *GRISWOLD INN, INC. V. STATE OF CONNECTICUT*, 183 CONN. 552, 441 A.2D 16 (CONN. 1981), WITHIN THE MEANING OF RULE 10.1(B), RULES OF THE SUPREME COURT.

The Petitioners assert that the decision below conflicts with the decision of the Supreme Court of Connecticut in *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981), on the same federal question. Because both decisions are from state courts of last resort, the Petitioners reason that Rule 10.1(b) provides an express reason for this Court to exercise its discretion under 28 U.S.C. § 1257 and issue a writ of certiorari. A careful

analysis of the two decisions, however, reveals no conflict. Therefore, no jurisdictional vehicle exists under 28 U.S.C. § 1257 for the Court to issue such a writ.

In *Griswold Inn*, the court struck down a state law prohibiting the sale of alcohol on Good Friday as unconstitutional under the federal establishment clause. Here, the First District upheld the validity of a county ordinance prohibiting the sale of alcohol on Christmas against an establishment clause challenge. By a simplistic and analytically superficial deduction the Petitioners urge the Court to conclude that the decisions conflict. An examination of similarities is entirely appropriate to a conflict analysis, but in the cases of *Griswold Inn* and *Silver Rose Entertainment*, any salient similarity ends with the alcohol sales prohibition common to both. For Rule 10.1(b) to provide a vehicle for jurisdiction, there must be a fundamental conflict. Here there is not.

Good conflict analysis requires searching for distinctions and systematically neutralizing them. The most obvious distinction between the two cases is that *Griswold Inn* reviewed a Good Friday alcohol sales ban while *Silver Rose Entertainment* examined a Christmas alcohol sales ban. The Petitioners would obscure this distinction by use of a large ecclesiastical calendar on which Christmas and Good Friday are circled prominently. The Petitioners thus submerge the decisive distinction between Good Friday and Christmas beneath a simplistic reduction by which the two are rendered undifferentiated peas in a constitutional pod.

This Court has been at considerable pains to carefully study Christmas and to identify it as a holiday of secular significance wholly independent of its sectarian origins. In

*Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court concluded that a Christmas display in the heart of the Pawtucket, Rhode Island, shopping district that included a crèche and other symbols associated with Christian religions did not violate the establishment clause. The Court specifically recalled the history by which the federal government had overtly recognized and observed Thanksgiving and Christmas as national holidays, even though they grew out of and still retain sectarian significance, stating, "Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance." *Id.* at 676.

In *Lynch* the Court undertook a lengthy discourse illustrating the pervasiveness of sectarian influences on secular institutions, emphasizing certain national traditions linked historically to religious holidays and observances. *Id.* at 673-78. Paying particular attention to the status of Christmas under the establishment clause the Court observed, "The city, like the Congresses and Presidents . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680-81. Chief Justice Burger summarized this important decision:

> To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be stilted overreaction contrary to our history and to our holdings. If

> the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution. *Id.* at 686.

Although she joined the majority in *Lynch*, Justice O'Connor also concurred separately and observed regarding Christmas, "The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood." *Id.* at 692.

In stark contrast, this Court has never examined the status of Good Friday under the establishment clause, nor suggested in any way that it has a secular tradition. The Petitioners' assertion that the sustaining of the Christmas alcohol sales ban in *Silver Rose Entertainment* conflicts with the striking of a Good Friday alcohol sales ban in *Griswold Inn* defies the distinction expressly articulated by the Connecticut Supreme Court in the latter case, in which it recognized "the traditional Christian significance of Good Friday and Christian exhortation to fast and abstain on that day in mourning for the death of Christ . . . ." *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 20. Concluding that the purpose of the alcohol sales prohibition was to promote fasting and abstinence, the *Griswold Inn* court emphasized, "Moreover, the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins. . . . [T]here is no doubt that Good Friday lacks widespread public popularity or

acceptance as a secular holiday." *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 21.

In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *pet. for reh'g denied and sugg. for reh'g en banc rejected*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. ___, 112 S.Ct. 3027 (1992), the Ninth Circuit Court of Appeals sustained a Hawaiian statute declaring Good Friday to be a paid legal holiday for state employees against an establishment clause challenge. The most interesting aspect of *Cammack* is Judge Nelson's lengthy dissenting opinion in which he expressly distinguishes Christmas, as both a secular holiday and a religious holy day, from Good Friday, singularly a religious holy day. Judge Nelson summarized his views thus:

> [P]eople of many religions or of no religion at all celebrate Thanksgiving and even Christmas, but it would be difficult to find atheists, Jews, or Baha'is engaging in Good Friday commemorations. Christmas, indeed, may be seen as a whole season, which the man who is perhaps its greatest secularizer described as "a good time; a kind, forgiving, charitable, pleasant time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow-passengers to the grave, and not another race of creatures bound on other journeys." Dickens, *A Christmas Carol* 8-9 (Bantam ed. 1986). To say that such an ecumenical spirit pervades Good Friday is

> simply untenable. I must agree that there is no evidence that "the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Cammack v. Waihee*, 932 F.2d at 790 (citations omitted).

Subsequent to the original panel decision of the Ninth Circuit Court of Appeals in *Cammack*, a petition for rehearing was denied by the panel and a suggestion for rehearing en banc was rejected by the full court. This result was reported in *Cammack v. Waihee*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. ___, 112 S.Ct. 3027 (1992). Five members of the full court dissented from the rehearing en banc rejection order. The dissenters observed:

> Good Friday is a wholly sectarian holiday. By contrast with Sunday, Thanksgiving, and Christmas—each of which has come to have secular significance—there is no recognizable secular tradition surrounding Good Friday. While non-believers may associate Sundays with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard-pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion—and nothing else. *Cammack v. Waihee*, 944 F.2d at 470.

The analysis utilized by the majority in *Griswold Inn* and by the dissenters in the two *Cammack* decisions cogently illustrates the historical distinction between Christmas as a secular holiday and Good Friday, always the sectarian holy

day. Against this jurisprudential backdrop, the Petitioners suggest another syllogism. By associating Easter with certain symbols and a tradition, the Petitioners assert that Easter must be observed as a secular holiday. Assuming that such an inference is sound, the Petitioners would extend the association to Good Friday for their crucial deduction that Good Friday is also a secular holiday. The fallacy is that in *Griswold Inn*, the decision asserted to be in conflict with that of the First District, Good Friday was specifically determined to be a solemn religious holy day lacking any secular holiday tradition. *Griswold Inn, Inc. v. State of Connecticut*, 183 Conn. at ___, 441 A.2d at 21. Therefore, the Petitioners' syllogism fails and *Griswold Inn* presents no conflict with the First District's decision sustaining the Christmas alcohol sales ban.

## II. THE SUPREME COURT SHOULD DECLINE TO GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW THAT PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON CHRISTMAS DOES NOT ON ITS FACE VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

As a result of the parties' stipulation that the First District render a final decision on the merits of the Petitioners' constitutional challenge, the Petitioners waived any right to return to the trial court and create a further record. The stipulation effectively narrowed the controversy to whether the alcohol sales ban on its face violates the establishment clause. *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 248, (P.A. at 17-18). This Court's review would of necessity be limited to the same facial inquiry.

The modern establishment clause test was first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In 1988, this Court reaffirmed the *Lemon* test in *Bowen v. Hendrick*, 487 U.S. 589 (1988). In *Bowen*, Chief Justice Rehnquist restated the *Lemon* three part test:

> As in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon v. Kurtzman. Under the Lemon standard . . . a court may invalidate a statute only if it is motivated *wholly* by an impermissible purpose, if its *primary* effect is the advancement of religion, or if it requires *excessive* entanglement between church and state . . . . *Id.* at 602 (citations omitted) (emphasis added).

The First District correctly cited *Lemon* for the proper analytical framework, *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 250-51, (P.A. at A-27), and then applied the purpose, effect and entanglement components thereof to the facial elements of the Christmas alcohol sales ban before concluding that the regulation was valid on its face. *Id.* at 252-53, (P.A. at A-31-35). Although the County's regulation is silent as to purpose, the First District inferred two legitimate purposes not offensive to the establishment clause: the "encourage[ment of] a respite from work, making family activity on Christmas Day possible" and the "discourage[ment of] consumption of alcohol on Christmas." *Id.* at 252, (P.A. at A-31-32). Contrary to the Petitioners' unsupported assertion that "abstention from alcohol is an important practice on [Christmas] for certain

Christian denominations" (petition at 14), the First District stated, "[W]e are unable to discern any religious principle that the ordinance under challenge endorses. We are aware of no religious sect that advocates nor any religious teaching to the effect that alcohol should be consumed or be readily available on every day of the year other than Christmas." *Id.*, (P.A. at A-34).

The County submits further that no sectarian denomination, Christian or otherwise, teaches or requires abstention from the consumption or sale of alcohol on Christmas in particular. Moreover, the alcohol sales ban does not prohibit the consumption of alcohol on Christmas, as noted by the First District. *Id.*, footnote 5, (P.A. at A-33).

The writ of certiorari being discretionary under Rule 10, this Court has expressed its disdain for exercising such discretion unless special and important reasons exist. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The establishment clause standard applicable to this case has been clearly expressed since 1971 in *Lemon*, and has survived the test of time as reflected in *Bowen* in 1988. The First District correctly enunciated the test, thus presenting no occasion for this Court to rectify an errant articulation. The First District's application of that test in its facial review of the County's regulation was correct. Therefore, the Court's issuance of a writ of certiorari would provide no opportunity for the Court to visit an important federal question previously not considered by it. Review could only serve the purpose of providing the Petitioners with a fourth forum for considering an issue which is of specific concern to them as litigants, a purpose unsuited for certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. at 74.

## III. THE EQUAL PROTECTION ISSUE ASSERTED BY THE PETITIONERS WAS NOT TIMELY AND PROPERLY RAISED SO AS TO GIVE THE SUPREME COURT A JURISDICTIONAL BASIS TO REVIEW BY A WRIT OF CERTIORARI ANY PUTATIVE EQUAL PROTECTION ASPECTS OF THE DECISION BELOW.

The Petitioners' pleadings in the trial court consisted of their complaint (R.A. at A-1) and verified motion for temporary injunction and memorandum of law (R.A. at A-7). A thorough dissection of these pleadings reveals no articulated claims that a Christmas alcohol sales ban violates the equal protection clause of the Fourteenth Amendment. Likewise, no reference to equal protection can be found in the trial court's order denying the motion for temporary injunction (P.A. at A-1).

The First District expressly rejected the Petitioners' assertion that the decision of the Florida Supreme Court in *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960), compelled the invalidation of the alcohol sales ban. The First District quoted from the Petitioners' brief submitted below and observed:

> Appellants contend that "the Florida Supreme Court appears to have held that any statute premised upon the requirement that a business close on Sunday, Christmas, or any other religious days is unconstitutional as abridging the separation of Church and State Doctrine." Initial Brief, at 17. We do not read the decision in *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960), on which appellants rely,

> for such a broad proposition. *Silver Rose Entertainment*, 646 So. 2d at 249, (P.A. at A-21) (footnote omitted).

In response to the Petitioners' misapprehension that *Moore v. Thompson* was decided on establishment clause grounds, the First District distinguished it as a case that "rested on notions of equal protection." *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 249, (P.A. at A-22). Further on, the First District observed, "Subsequent case law has confirmed the essentially 'equal protection' basis for the court's decision in *Moore*." *Id.* at 250, (P.A. at A-25).

Upon careful scrutiny, it cannot be said that the First District even decided a putative equal protection question which would provide this Court a basis to exercise its discretionary jurisdiction. In distinguishing *Moore v. Thompson*, the passing observation by the First District regarding the absence of any cases holding a regulation applicable to alcoholic beverage licensees as violative of equal protection cannot equate to a definitive ruling on a federal question. To invoke federal question jurisdiction under 28 U.S.C. § 1257, the rule of this Court is that the federal question must have been decided in the state court, and that such decision was necessary for the determination of the case. *Honeyman v. Hanan*, 300 U.S. 14 (1937).

It is apparent from the record that no equal protection challenge was ever asserted by the Petitioners before either the trial court or the First District. No decision was rendered on an equal protection question, nor was such a decision necessary for the determination of the case. This Court has ruled that its discretionary jurisdiction under 28 U.S.C. § 1257 does not lie unless the federal question presented to it

was timely and properly raised below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Therefore, this Court's discretionary jurisdiction should not be invoked.

## IV. THE SUPREME COURT SHOULD DECLINE TO GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW WHICH THE PETITIONERS INCORRECTLY ASSERT TO HAVE ERRONEOUSLY SUSTAINED THE COUNTY'S CHRISTMAS ALCOHOL SALES BAN AS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Despite having never raised an equal protection issue below the Petitioners now assert that a Christmas alcohol sales ban is unconstitutional on this new ground. The Petitioners claim that the alcoholic beverage licensee class of which they are a part is unconstitutionally discriminated against because businesses outside their class are not subject to the County's regulation. The Petitioners' untimely claim is unavailing and should not serve as a basis for this Court's discretionary jurisdiction under 28 U.S.C. § 1257.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court held that in the economic and social arena equal protection only requires that a regulation "be rationally based and free from invidious discrimination." *Id.* at 487. The Court allowed the regulating authority great latitude under this equal protection standard, stating:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v Natural Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v City of Chicago, 228 US 61, 69–70, 57 L Ed 730, 734, 33 S Ct 441. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101. *Dandridge v. Williams*, 397 U.S. at 485.

This Court has characterized the *Dandridge* rational-basis scrutiny as "the most relaxed and tolerant form of scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

In *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), a companion case to *McGowan v. Maryland*, 366 U.S. 420 (1961), cited in *Dandridge v. Williams*, this Court considered and sustained the constitutionality of the Pennsylvania Sunday blue laws specifically against an equal protection challenge. There the commodities for which Sunday sales were prohibited included alcoholic beverages. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. at 587. The Court also rejected the same argument raised here by the

Petitioners (petition at 21-22) that the disparate impact of the regulations, which affected some businesses but not others, violates equal protection. *Id.* at 589-92. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

In the decision below the First District examined the face of the regulation banning alcohol sales on Christmas, which is silent as to purpose, and observed, "One apparent purpose is to encourage a respite from work, making family activity on Christmas Day possible. . . . [T]he ordinance evinces another apparent purpose: To discourage consumption of alcohol on Christmas." *Silver Rose Entertainment, Inc. v. Clay County*, 646 So. 2d at 252, (P.A. at A-31, 32). The trial court found purpose for the ban both in the protection of the traveling public at a deadly time of the year from the standpoint of highway safety (P.A. at A-8-9), and in the recognition that, Christmas being a traditional time for family gathering and alcohol often serving as an accelerant to domestic violence, tranquillity and order within the family gathering could be served by discouraging the consumption of alcohol (P.A. at A-9).

In the more specific economic and social regulatory arena of alcoholic beverage sales, this Court has determined that the Twenty-first Amendment to the Constitution of the United States provides even greater authority for regulation in areas which might otherwise be protected under the Constitution. In *California v. La Rue*, 409 U.S. 109 (1972), the Court upheld regulations prohibiting, among other things, nude dancing in places licensed for the sale of alcoholic beverages for on-premises consumption. Quoting from an earlier decision of the Court, Justice Rehnquist for the majority reaffirmed that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the

Fourteenth." *California v. La Rue*, 409 U.S. at 115 (quoting *State Board v. Young's Market Co.*, 299 U.S. 59, 64 (1936)).

The Court acknowledged that, but for the Twenty-first Amendment, some of the proscribed conduct might be protected under the Constitution. *California v. La Rue*, 409 U.S. at 118. Upholding the regulations nevertheless, the Court concluded, "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.* at 118-19 (footnote omitted). *See also New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981).

The Petitioners' argument that a Christmas alcohol sales ban violates equal protection is merely an attempt to repackage their establishment clause claim under another constitutional label. *See Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 9 Fla. L. Weekly Fed. D55 (M.D. Fla., May 12, 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994). Both claims are functionally cognate under the circumstances presented here, for the establishment clause test applicable under *Lemon* subsumes the notion that government must not exercise its power in a manner which by its purpose or effect imposes the religious observance practices or traditions of a particular sectarian class on other sectarian or non-sectarian classes.

In the event a federal question under equal protection is deemed to have been timely and properly raised below so as to provide this Court a jurisdictional basis to review the same, the Court should decline to issue a writ of certiorari to consider equal protection. The jurisprudence of the Court is well-established and stable regarding equal protection and

regulation in the economic and social arena and need not be unduly disturbed.

The Twenty-first Amendment provides even greater authority in the regulation of alcoholic beverage sales as against an equal protection challenge. Consideration of the First District's decision below would provide the Court no opportunity to examine an equal protection question not previously answered by it. Special or important reasons do not exist which would justify this Court's exercise of its discretionary jurisdiction under 28 U.S.C. § 1257 to revisit equal protection or Twenty-first Amendment jurisprudence undisturbed by the First District's decision below. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

## CONCLUSION

For the foregoing reasons this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Respondent's Appendix


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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT IN, AND FOR CLAY COUNTY, FLORIDA

CASE NUMBER: 93-2425 CA

DIVISION: A

SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, SUNSHINE FOOD MART, a Florida proprietorship, DALE'S PACKAGE STORE AND LOUNGE, INC. a Florida corporation, KELLY NAIL INC., a Florida corporation, WARD CASTENADA INC., a Florida corporation, HARRY'S OF ORANGE PARK, INC., a Florida corporation, VARSITY CLUB, INC., a Florida corporation, FLYNN RESTAURANTS, LTD., an Iowa corporation, and 57 HEAVEN

Plaintiffs,

vs.

CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff of Clay County,

Defendants.

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**COMPLAINT**

Plaintiffs, SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, SUNSHINE FOOD MART, a Florida proprietorship, DALE'S PACKAGE STORE AND

LOUNGE, INC. a Florida corporation, KELLY NAIL, INC., a Florida corporation, WARD CASTENADA, INC., a Florida corporation, HARRY'S OF ORANGE PARK, INC., a Florida corporation, VARSITY CLUB, INC., a Florida corporation, FLYNN RESTAURANTS, INC., an Iowa corporation, and 57 HEAVEN by and through their undersigned counsel, sue the Defendants, CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff, and states as follows:

## GENERAL ALLEGATIONS

1. Plaintiffs are all authorized to do business and are doing business in Florida and in Clay County, and are the owners of establishments licensed to sell alcoholic beverages in and all have their principal place of business located in the unincorporated areas of Clay County, Florida.

2. The Defendant, Clay County, is a political subdivision of the State of Florida. The Defendant, SCOTT LANCASTER (hereinafter called "Sheriff"), is the Sheriff of Clay County.

3. Clay County has by provisions of the Clay County Code undertaken to regulate the hours for the sale, consumption and service of all alcoholic beverages in all establishments licensed by the State. The part of the Clay County Code pertinent to this action is contained in Chapter 3, Clay County Code, Section 3-2. See Exhibit "A", attached hereto.

Section 3-2(c), Clay County Code, provides:

> "An exception to the above stated hours of sale shall be that no alcoholic beverage shall be sold on Christmas day until the regular authorized opening sale time on December 26th. The intention of this subsection is that no alcoholic beverages be sold during Christmas day and Christmas night of each year."

As a result of Section 3-2, Clay County has banned the sale of alcoholic beverages on Christmas day only, forcing the Sheriff of Clay County to monitor alcoholic beverage sales on Christmas Day and, in effect, force the observance of a religious holiday by liquor licensees.

## COUNT I
## TEMPORARY AND PERMANENT JURISDICTION

3. Plaintiffs reincorporate and reallege paragraph one (1) through three (3) above as if set forth in full.

4. This is an action for temporary and permanent injunctive relief.

5. The Plaintiffs are and have been establishments licensed by the State of Florida to sell alcoholic beverages and are therefore subject to the effect of Section 3-2, Clay County Code.

6. The function of the Sheriff, as provided by the subject ordinance, is the enforcement of Section 3-2 of the Clay County Code.

7. Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article 1, Section 3, of the Florida Constitution, in that the statute advances religion in general, and particularly the Christian religion, but does not reflect a clearly secular legislative purpose and therefore results in entanglement between religion and state.

8. If the Defendants are not enjoined from the enforcement of Section 3-2, Clay County Code, the Plaintiffs will be deprived of the privilege of selling alcoholic beverages on Christmas in violation of their rights and will suffer harm which cannot adequately be quantified or remedied by an action at law in that Plaintiffs will lose revenue from being forced to close on Christmas (a Saturday) and Plaintiffs will be subject to revocation of its liquor license, and Plaintiff's will be subject to a fine or imprisonment of its principals and/or employees, if liquor is served on Christmas.

**WHEREFORE,** the Plaintiffs pray this Honorable Court will enter its judgement temporarily and permanently enjoining Clay County and the Sheriff from prohibiting the entertainment of Section 3-2 Clay County Code banning the Christmas sale, consumption and service of alcoholic beverages on Christmas Day for which Plaintiffs are licensed in the State of Florida, together which with such other relief as the Court deems proper.

## COUNT II
## DECLARATORY JUDGMENT

9. Plaintiffs reincorporate and reallege paragraph one (1) through three (3) above as if set forth in full.

10. This is an action for declaratory relief pursuant to Chapter 86, Florida Statutes, 1993.

11. Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article 1, Section 3, of the Florida Constitution, in that the statute advances religion in general, and particularly the Christian religion, but does not reflect a clearly secular legislative purpose and therefore results in entanglement between religion and state.

12. Through the effect of Section 3-2, Clay County Code, Plaintiffs will be deprived of the privilege of selling alcoholic beverages on Christmas Day in violation of their rights. As such, there exists an actual and bona fide controversy over the constitutionality of Sections 3-2, Clay County Code.

13. Plaintiffs are in doubt about its rights to serve alcoholic beverages on Christmas Day and requests a determination as to the constitutionality of Section 3-2, Clay County Code.

14. Because Plaintiffs' doubt as to whether Section 3-2, Clay County Code, is constitutional, Plaintiffs are therefore in doubt as to whether it can lawfully sell alcoholic beverages on Christmas Day. If Plaintiffs, do not sell

alcoholic beverages on Christmas Day then Plaintiffs will lose revenue from being forced to close on Christmas Day (a Saturday) and if Plaintiffs sell alcoholic beverages on Christmas Day they may be subject to revocation of its liquor license, a fine or imprisonment of its principals and/or employees.

15. Plaintiffs have retained the undersigned counsel to bring this action to obtain a judicial determination of the constitutionality of Section 3-2, Clay County Code, and has obligated itself to pay a reasonable attorney fee.

**WHEREFORE,** the Plaintiffs pray this Honorable Court will enter its judgment declaring Section 3-2 of the Clay County Code to be unconstitutional, together which with such other relief the Court deems proper.

**MARKS, GRAY, CONROY, & GIBBS, P.A.**

/s/ Stephen C. Bullock
**Stephen C. Bullock, Esquire**
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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT IN, AND FOR CLAY COUNTY, FLORIDA

CASE NUMBER: 93-2425 CA

DIVISION: A

SILVER ROSE ENTERTAINMENT, INC., a Florida corporation, et. al

Plaintiffs,

vs.

CLAY COUNTY, a political subdivision of the State of Florida, and SCOTT LANCASTER, as Sheriff of Clay County,

Defendants.

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**VERIFIED MOTION FOR TEMPORARY INJUNCTION AND MEMORANDUM OF LAW**

Plaintiffs, by and through their undersigned counsel and pursuant to Rule 1.610, Florida Rules of Civil Procedure, moves this Court for a temporary injunction enjoining the Defendants from enforcing Section 3-2(c), Clay County Code, which prohibits the sale of alcoholic beverages on Christmas Day. As grounds for said motion, Plaintiffs state as follows:

## FACTS

Section 3-2(c), Clay County Code, provides:

> "An exception to the above stated hours of sale shall be that no alcoholic beverage shall be sold on Christmas day until the regular authorized opening sale time on December 26th. The intention of this subsection is that no alcoholic beverages be sold during Christmas day and Christmas night of each year."

See Exhibit "A", attached hereto. As a result of Section 3-2, Clay County has banned the sale of alcoholic beverages on Christmas day only, forcing the Sheriff of Clay County to monitor alcoholic beverage sales on Christmas day and in effect, force the observance of a religious holiday by liquor licensees.

Plaintiffs are and have been, owners of various business establishments properly licensed by the State of Florida to sell alcoholic beverages and is therefore subject to the effect of Section 3-2, Clay County Code. The function of the Sheriff of Clay County is to enforce all ordinances in Clay County, including the enforcement of Section 3-2 of the Clay County Code.

Section 3-2 of the Clay County Code is unconstitutional and violates the establishment clause of the First and Fourteenth Amendments of the United States Constitution and violates Article I, Section 3, of the Florida

Constitution, in that the Section 3-2 advances religion in general and particularly the Christian religion, and does not reflect a clearly secular legislative purpose. Hence, the effect of Section 3-2 of the Clay County Code results in entanglement between religion and state.

It is obvious on the face of Section 3-2, Clay County Code, that the overall intent of the legislative enactment is to advance the Christian religion to the exclusion of other religions. If the Defendants are not enjoined from the enforcement of Section 3-2, Clay County Code, Plaintiffs will be deprived of their privilege of selling alcoholic beverages on Christmas in violation of their rights and will suffer irreparable harm which cannot adequately be quantified or remedied by an action at law since Plaintiffs will lose revenue from being forced to close on Christmas Day (a Saturday) and Plaintiffs will be subject to imprisonment of its principals and/or employees, fine and/or license revocation if it sells alcoholic beverages on Christmas Day.

## LAW

There is a substantial likelihood that Plaintiffs will prevail on the merits of this case. Although there are no Florida cases directly on point addressing the constitutionality of county ordinances prohibiting the sale of alcoholic beverages on religious holidays, the exact same issue has been recently addressed by the Supreme Court of Connecticut in Griswold Inn, Inc. v. State of Connecticut, 441 A.2d 16, (1981). In Griswold, the Supreme Court of Connecticut dealt with the exact same issue of whether a statute can prohibit the sale of alcoholic beverages on a religious holiday, namely, Good Friday. The Griswold Court

held that the statute in question violated the establishment clause of the United States Constitution and the Establishment Clause of the Connecticut Constitution. In reaching its conclusion, the Griswold Court noted that the United States Supreme Court had set forth a three-part test to determine whether a law violated the establishment clause.

> "To pass muster under the establishment clause the law in question, first must reflect a clearly secular legislative purpose, second, have a primary effect that neither advances or inhibits religion, and third, must avoid excessive governmental entanglement with religion." Committee for Public Education v. Nyquist, 413 US 756, 772, 773, 93 S. Ct. 2955, 2965-66, 37 L. Ed. 2d 948 (1973). If a legislative enactment fails any one part of the test, it must fall. Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed.2d 199 (1980). Id at 18.

As for the first prong of the test, the Griswold Court found that no clear secular purpose justified prohibition of liquor sales on Good Friday. The Griswold Court noted that although the state contended that the purpose of the legislation was to prohibit the sale of liquor on a holiday which enjoys state wide celebration, plain reading of the statute showed that it could not be the true legislative intent.

> "Had the legislature been concerned with celebrating a secular holiday, it would have prohibited the sale of alcohol on other holidays. Given the traditional significance of Good Friday and Christian exhortation to fast and abstain on that day in mourning for the death of Christ, the singling out of Good Friday reveals that there is no clear secular purpose which justifies the prohibition of liquor sales on this day." Id.

Therefore, the statute prohibiting the sale of alcohol on Good Friday failed the first part of the test.

The statue likewise failed the second prong of the test, since the primary effect of the statute prohibition of liquor sales on Good Friday was to advance religion. The Court noted that the Good Friday prohibition advanced religion in general and in particular the Christian religion by preventing the sale and drinking of liquor on only one day a year, Good Friday, a religious holiday for Christians. The Griswold Court noted that impermissible effects of the law were two-fold. First, the existence of that legal prohibition on this major Christian religious holiday gave the state's clear stamp of approval to both the Christian rights and practices observed on that day and to Christianity in general. Id at 17. Second, beyond merely indicating state approval of Christian Good Friday rites, the law imposed their observance on both

Christians and non-Christians alike since licensees such as the Plaintiffs, are subject to revocation their liquor licenses, a fine or imprisonment if liquor is served on that day. Id. Thus, the primary effect of the Good Friday prohibition was an endorsement of the Protestant and Catholic faiths.

The Griswold Court further rejected the Defendant's argument that the primary effect of the Good Friday prohibition was to promote traffic safety and encourage safety on recreational holidays on a date celebrated as a state-wide holiday. Id. However, the Court noted that facts did not indicate that Good Friday presented any special problems and that any problem with alcohol abuse on that day is at most speculative and incidental to the primary religious impact. Id.

Finally, with regard to the third prong of the test, the Griswold Court noted that the Good Friday prohibition required excessive and impermissible entanglement of government with religion. First, the statute required an impermissible degree of inspection or monitoring of religious practices since the state must monitor the sale of alcohol on Good Friday, since the state must monitor and enforce the observance of a religious holiday by liquor licensees in order to enforce the statute. Id. at 18. Second, the Good Friday prohibition endangered political entanglement with religion by creating political divisions and debate along religious lines. Id. The Court noted that debates over the propriety of the Good Frida prohibition encouraged division along religious lines with religious institutions and practicing Christians being pitted against non-Christians and non-religious persons. It is this sort of fragmentation along religious line which is one of the principal evils against which the establishment clause was intended to protect Id.

Since the Good Friday prohibition statute satisfied non of the three (3) prongs of the test enunciated by the United States Supreme Court in Nyquist, supra, for determining when a state had overstepped the limits of neutrality in religious matters, Good Friday prohibition statute clearly violated the establishment clause and was unconstitutional.

The instant case presents an identical situation. Section 3-2, Clay County Code, specifically states that it is "the intention of this subsection that no alcoholic beverages be sold during Christmas day and Christmas night of each year". **The ordinance does not prohibit alcoholic beverage sales on any other holiday.** Clearly, the intent of the ordinance is to promote the observance of a Christian religious holiday in clear violation of the establishment clause of the United States Constitution as well as Article 1, Section 3 of the Florida Constitution ("There shall be no law respecting the enforcement or establishment of religion . . .). Simply substitute "Christmas Day" for "Good Friday", and the entire opinion in Griswold, supra, can be adopted in its entirety to hold Section 3-2 of the Clay County Code unconstitutional.

There is judicial precedent in this jurisdiction for holding a local ordinance regulating the sale of alcoholic beverages as being unconstitutional although the factual circumstances were different. In City of Jacksonville v. C.J. Ventures, Inc., 558 So.2d 133 (Fla. 1st DCA 1990) the operator of a bar and restaurant in the City of Jacksonville Beach filed suit seeking temporary and permanent injunction against the City and the Sheriff regarding enforcement of an ordinance regulating the sale of alcoholic beverages on Sunday, on the basis that the ordinance violated due process by failing to provide the Sheriff with any criteria or standards

to determine compliance with the ordinance. The particular ordinance allowed only "bona fide restaurants" to serve alcoholic beverages on Sunday, such restaurants being defined as those deriving fifty-one per cent (51%) of their gross revenue from the sale of food and not alcoholic beverages and the principal business of the restaurant being to serve full course bona fide meals to the general public. The local Circuit Court Judge Bill Parsons, entered a temporary injunction against the Sheriff and the City of Jacksonville from enforcing the ordinance holding that the ordinance was unconstitutional since it violated due process provisions of the Fifth Amendment of the Constitution of the United States. On appeal, the First District Court of Appeal affirmed the injunction.

This Court should also note that only the unincorporated areas of Clay County are subject to the provisions of Section 3-2 of the Clay County Code. Specifically, Section 4-3 of Chapter 4 of the City of Orange Park Ordinances does not prohibit the sale of alcoholic beverages on Christmas Day. See Exhibit "B", attached hereto. Therefore, stores, restaurants, lounges and night clubs in the incorporated City of Orange Park are allowed to sell and serve alcoholic beverages and, hence, the City of Orange Park has revoked the Clay County Ordinance, Section 3-2. As a consequence, Section 3-2 of the Clay County Code is being applied arbitrarily and capriciously to those stores, lounges and restaurants in the unincorporated areas of Clay County. Further, in Duval County there is no prohibition against the sale of alcoholic beverages on Christmas Day. Therefore, since the unincorporated areas of Clay County are contiguous (and, in fact in between) Duval County and the City of Orange Park, Section 3-2 of the Clay County Code creates an arbitrary and capricious ban against the sale of

alcoholic beverages without any rational relationship to a legitimate legislative purpose.

**WHEREFORE,** Plaintiffs pray this Honorable Court will enter its judgement temporarily and permanently enjoining Clay County and the Sheriff from prohibiting the Christmas sale, consumption and service of alcoholic beverages for which the Plaintiff is licensed in the State of Florida, together which with such other relief as the Court deems proper.

**DATED** this 17th day of December, 1993.

**MARKS, GRAY CONROY & GIBBS, P.A.**

/s/ Stephen C. Bullock
**Stephen C. Bullock, Esquire**
Florida Bar No.: 0347264
William K. Thames, II, Esquire
Florida Bar No.: 856118
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Jacksonville, FL 32201
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Attorneys for Plaintiffs

## VERIFICATION

The undersigned hereby verifies that immediate and irreparable injury, loss and/or damage will result to SILVER et al, if Section 3-2 of the Clay County Code is enforced on Christmas Day, December 25, 1993.

DATED this 17th day of December, 1993.

SILVER ROSE ENTERTAINMENT, INC.

By: /s/ Bernie H. Smith
BERNIE H. SMITH

/p/ Bernie H. Smith

(3)

Supreme Court, U.S.
FILED
OCT 11 1995
OFFICE OF THE CLERK

CASE NUMBER: 95-327

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

**ILVER ROSE ENTERTAINMENT, INC., A FLORIDA ORPORATION; SUNSHINE FOOD MART, A FLORIDA ROPRIETORSHIP; DALE'S PACKAGE STORE AND OUNGE INC., A FLORIDA CORPORATION; KELLY AIL, INC., A FLORIDA CORPORATION; WARD ASTENADA, INC., A FLORIDA CORPORATION; ARRY'S OF ORANGE PARK, INC., A FLORIDA ORPORATION; VARSITY CLUB, INC., A FLORIDA ORPORATION; FLYNN RESTAURANTS, LTD., AN IOWA ORPORATION, 57 HEAVEN, A CORPORATION; AND INTER ENTERPRISES, INC., A FLORIDA RPORATION,**

**TITIONERS,**

**AY COUNTY, A POLITICAL SUBDIVISION OF THE ATE OF FLORIDA, AND SCOTT LANCASTER, AS ERIFF OF CLAY COUNTY,**

**SPONDENTS.**

---

**PETITION FOR WRIT OF CERTIORARI FROM THE FLORIDA FIRST DISTRICT COURT OF APPEAL**

**REPLY TO BRIEF IN OPPOSITION**

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## I. REPLY TO RESPONDENTS' CLAIM THAT THIS COURT LACKS CERTIORARI JURISDICTION AS A MATTER OF LAW CONCERNING PETITIONERS' EQUAL PROTECTION ARGUMENT.

Respondents correctly point out that this Court's rule concerning discretionary jurisdiction under 28 U.S.C. § 1257 does not lie unless the federal question was decided at the state court level (R.A. at 18). However, upon a careful reading of the First District Court of Appeal's opinion, it can be said with certainty that the Equal Protection issues were addressed and subsequently decided by that Court. The First District observed:

> Appellants' attack on Clay County's ordinance predicated on the line of cases culminating in Moore boils down, therefore, to an assertion that there is no "valid and substantial reason" for regulating the hours of sale of alcoholic beverages, when no other enterprise is so restricted. But this type of discrimination against purveyors of alcoholic beverages is the rule rather than the exception. No case of which we are aware has held that an ordinance "violates the state and federal guarantees of equal protection of the laws," Shevin v. Bocaccio, Inc., 379 So. 2d 105, 106 (Fla. 1979), because it "applies only to alcoholic beverage

licensees and their employees." Id., (P.A. at A-25, A-26).

It is plain from a reading of the above quoted material that the Equal Protection issues inherent in this case were realized, addressed, and ultimately dismissed by the Florida First District Court of Appeal. Because the Equal Protection issues were decided by the Florida First District Court of Appeal, the Respondents' claim that this Court lacks discretionary jurisdiction as a matter of law fails. Therefore, this Court's discretionary jurisdiction may be invoked pursuant to 28 U.S.C. § 1257.

## II. REPLY TO RESPONDENTS' CLAIM THAT THE CLAY COUNTY ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

Respondents' assert that the Clay County Ordinance prohibiting the sale of alcohol on Christmas Day is not violative of the Equal Protection clause because, as Respondents claim, the ordinance is rationally based and free of invidious discrimination as required by this Court in Dandridge v. Williams, 397 U.S. 471 (1970),(R.A. at 19-23). Respondents rely on various excerpts from the opinions delivered by the two state courts identifying the following as bases for the ordinance: (1) to encourage a respite from work, making family activity on Christmas Day possible; (2) to discourage the consumption of alcohol on Christmas Day; (3) evidence offered by Respondents suggesting that Christmas is a particularly deadly time of year from the standpoint of highway safety (keeping in mind the high incidence of highway fatalities related to alcohol abuse); and (4) that

alcohol can serve as an accelerant to domestic violence, especially on Christmas Day when many families come together by tradition (R.A. at 21).

To be considered rational, the Clay County Ordinance must exist for the health, safety, or welfare of the citizens of the state of Florida, and not for the purposes of recognizing certain sectarian christian principles, such as abstaining from drinking alcohol on a religious holiday like Christmas Day. The only evidence proffered by the Respondents in the courts below concerns a 1992 study conducted by the Florida Department of Highway Safety and Motor Vehicles (partially reproduced in the appendix of this document). The study indicates, among other things, the fatality rate of traffic accidents occurring over a several day period during the following holidays: New Year's Eve, Memorial Day, Independence Day, Labor Day, Thanksgiving,

and Christmas. Petitioners do not question the validity of the study or the inference that the Christmas holidays have one of the higher fatality rates. Petitioners do, however, point out for the Court that the study involves a several day period for each holiday and not just a day, such as Christmas Day. Therefore, it is totally impossible to determine the number of alcohol related fatalities occurring, for example, on a given holiday like Thanksgiving Day or Christmas Day, as opposed to the preceding or following days. Therefore, because it is impossible to determine the fatality rate for Christmas Day and because many of the other holidays have high fatality rates as well, the study provided by Respondents does not provided a rational basis for isolating Christmas Day under the prohibitive ordinance. If anything, the 1992 study raises additional questions concerning the ordinance's true purpose. For example, if the purpose of the

ordinance is to make holiday travel safer, why is the sale of alcohol only prohibited on Christmas Day as opposed to the block of days outlined in the 1992 study. Further, if the real purpose was to protect the inhabitants of Clay County against alcohol-related traffic incidents rather than prohibiting the sale of alcohol on just one day out of the entire year, then why did Clay County choose not to regulate the holiday period beginning on the twenty-third or twenty-fourth of December and continuing through the twenty-sixth or twenty-seventh of Christmas, when a majority of the Christmas holiday travel occurs? Also, why did the County not choose to prohibit the sale of alcohol on any of the other holidays contained in the 1992 study? Could the answer lie in the fact that other holidays listed such as Thanksgiving and New Years are purely secular?

Finally, the Court should also note one of the final blows to Respondent's lukewarm

argument regarding the purpose of the "no sale of alcohol of Christmas being related to public safety and not religion" falls flat on its face when the entire ordinance is read. Subjection 3-2(d) extends the hours for sale of alcohol by another two (2) hours on the following weekend, New Year's Eve, a more dangerous holiday with no religious ties whatsoever.

Consequently, the search for a rational basis for the Clay County ordinance prohibiting the sale of alcohol on Christmas Day leads to one inescapable conclusion. The sole basis for the statute is to conform the behavior of all Clay County citizens so that the sensitivities of those practicing the Christian religion in the County are not offended. The final blow comes from the fact that the study submitted by Clay County was in 1992, whereas the Clay County Ordinance was enacted in 1979. The study covers the years 1989 through 1992 and, therefore,

cannot be considered as relevant because: (1) The study was not even in existence in 1979 and could not have been relied upon by the County when it enacted the ordinance[1], and (2) Clay County's ordinance prohibiting sale of alcohol was in effect 1989 through 1992 and, consequently, alcohol traffic-related fatalities in Clay County presumably could not have been considered.

Therefore, the record in this case is devoid of any evidence providing a rational basis for prohibiting the sale of alcohol on Christmas Day. There being no evidence of a rational basis supporting the County's enactment of the prohibitive ordinance, Petitioners and all other business establishments prevented from selling alcohol on Christmas Day are not afforded equal protection under the laws and ordinances of Clay County as guaranteed by the Fourteenth

---

[1] There was no evidence in the form of studies illustrating alcohol-related traffic fatalities in 1979 by which Clay County could have relied upon in enacting the ordinance.

Amendment to the Constitution.

Respondents also assert that the Twenty-First Amendment to the Constitution provides a rational basis for singling out Christmas Day as the ONLY day of the 365-day calendar year in which no alcohol may be sold in Clay County. While it is true that the Twenty-First Amendment gives states wide latitude in the enforcement of their police powers concerning the sale of alcoholic beverages, a state may not hide behind the amendment and assert such regulatory power for the sole purpose of respecting the sensitivities of certain sectarian religious groups. As argued above, the obvious purpose of this ordinance has nothing to do with Clay County's enforcement of its police powers and everything to do with the establishment of religion and equal protection under the law.

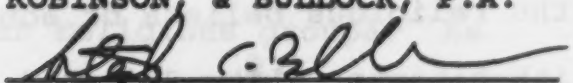
The Supreme Court of Connecticut came to the correct conclusion applying Federal Constitutional principles when it struck down

a local ordinance prohibiting the sale of alcohol on Good Friday. Griswold Inn, Inc. vs. State of Connecticut, 441 A.2d 16 (Conn. 1981). Although Respondent has done its best in attempting to nitpick differences between Griswold, supra, and the case at bar, the bottom line is that one ordinance chose to prohibit the sale of alcohol on Good Friday, while the other chose to prohibit the sale of alcohol on Christmas Day. The result is the same. The Clay County ordinance singled out of the entire 365-day year, Christmas Day, to prohibit the sale of alcohol in observance of the religious beliefs of some of its inhabitants. Like Griswold, supra, the Clay County ordinance is unconstitutional.

## III. CONCLUSION

Because the Equal Protection issues were addressed and decided by the Florida First District Court of Appeal, this Court is not prevented from exercising its discretionary jurisdiction concerning the Equal Protection issues raised by Petitioners. Because there is no rational basis for the Clay County ordinance prohibiting the sale of alcohol on Christmas Day, this Court should grant jurisdiction and overturn the ordinance.

BRANNON, BROWN, HALEY,
ROBINSON, & BULLOCK, P.A.



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Attorneys for Petitioners

Florida Department of Highway
Safety and Motor Vehicles

Holiday Traffic Fatalities - 1992

| Holiday | | '89 | '90 | '91 | '92 |
|---|---|---|---|---|---|
| New Year's Eve | Hours | 78 | 78 | 102 | 54 |
| | Fatalities | 45 | 39 | 22 | 7 |
| | Rate | .58 | .50 | .22 | .13 |
| Memorial Day | Hours | 78 | 78 | 78 | 78 |
| | Fatalities | 35 | 27 | 28 | 32 |
| | Rate | .45 | .35 | .36 | .41 |
| Independence Day | Hours | 102 | 30 | 102 | 78 |
| | Fatalities | 26 | 19 | 30 | 21 |
| | Rate | .25 | .63 | .29 | .27 |
| Labor Day | Hours | 78 | 78 | 78 | 78 |
| | Fatalities | 28 | 28 | 36 | 36 |
| | Rate | .36 | .36 | .46 | .46 |
| Thanksgiving | Hours | 102 | 102 | 102 | 102 |
| | Fatalities | 41 | 47 | 40 | 20 |
| | Rate | .40 | .46 | .39 | .20 |
| Christmas | Hours | 78 | 102 | 54 | 102 |
| | Fatalities | 43 | 40 | 15 | 43 |
| | Rate | .55 | .39 | .28 | .42 |
| Days in Year | Hours | 8760 | 8760 | 8760 | 8784 |
| | Fatalities | 3033 | 2951 | 2523 | 2480 |
| | Rate | .35 | .34 | .29 | .28 |

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that copies of the foregoing have been furnished to **Mark H. Scruby, Esquire**, Post Office Box 1366, Green Cove Springs, FL 32043, and **John Kopelousos, Esquire**, Post Office Box 562, Orange Park, FL 32067-0562 by Priority Delivery Service on this 14 day of October, 1995.

BRANNON, BROWN, HALEY,
ROBINSON & BULLOCK, P.A.

BY: _____
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